

**FEDERAL ELECTION COMMISSION**  
999 E Street, N.W.  
Washington, D.C. 20463

**FIRST GENERAL COUNSEL'S REPORT**

MUR: 5124

DATE COMPLAINT FILED: October 24, 2000

DATE OF NOTIFICATION: October 30, 2000

DATE ACTIVATED: July 26, 2000

EXPIRATION OF STATUTE OF  
LIMITATIONS: October 3, 2005<sup>1</sup>

STAFF MEMBER: Lawrence Calvert  
Julie Obi

COMPLAINANT: Phillip A. Miller

RESPONDENTS: Rehberg for Congress Committee and Lorna Kuney,  
as Treasurer

RELEVANT STATUTES: 2 U.S.C. § 441d(a)  
11 C.F.R. § 110.11(a)(1), (5) and (6)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

**I. GENERATION OF MATTER**

This matter was initiated by a complaint filed by Phillip A. Miller ("Complainant"), on  
October 24, 2000.<sup>2</sup> The complainant alleges that Rehberg for Congress Committee and Lorna

<sup>1</sup> This date, which is the Statute of Limitations date reflected in the Commission's Case Management and Enforcement Priority Systems, is five years from the date of complainant's original letter to the Commission, as described *infra* at n.2. Based on information in the response, as described further *infra* at page 3, the actual Statute of Limitations date may be as early as September 9, 2005.

<sup>2</sup> Mr. Miller's original letter, dated October 3, 2000, was returned to him as an improper complaint because it was not sworn to. See 11 C.F.R. § 111.4(b)(2) (complaints must be notarized and signed and sworn to in the presence of a notary public). Mr. Miller conformed his complaint to the regulation and properly filed it on October 24, 2000.

1 Kuney, as treasurer ("Rehberg Committee"), violated 2 U.S.C. § 441d(a) by placing painted  
2 highway signs that expressly advocated the election of a federal candidate but lacked the  
3 disclaimers required by the Federal Election Campaign Act of 1971, as amended ("the Act").  
4 The Rehberg Committee is the principal campaign committee of Dennis Rehberg, a candidate for  
5 the U.S. House of Representatives in Montana in the 2000 general election.

6 **II. FACTUAL AND LEGAL ANALYSIS**

7 **A. The Law**

8 The Act provides:

9 Whenever any person makes an expenditure for the purpose of financing  
10 communications expressly advocating the election or defeat of a clearly identified  
11 candidate, or solicits any contribution through any broadcasting station,  
12 newspaper, magazine, outdoor advertising facility, direct mailing, or any other  
13 type of general public political advertising, such communication—  
14

15 (1) If paid for and authorized by a candidate, an authorized  
16 political committee of a candidate, or its agents, shall clearly  
17 state that the communication has been paid for by such  
18 authorized political committee.  
19

20 2 U.S.C. § 441d(a). The disclaimer shall "appear and be presented in a clear and conspicuous  
21 manner to give the reader adequate notice of the identity of the persons who paid for and, where  
22 required, who authorized the communications." 11 C.F.R. § 110.11(a)(5). The disclaimer need  
23 not appear on the front face or page of a communication so long as it appears somewhere within  
24 the communication, except on communications such as billboards that contain only a front face.

25 *Id.*

**B. The Complaint**

The complainant provided two pictures that he took of the "Rehberg for Congress" highway signs that lacked the proper disclaimer required by the Act.<sup>3</sup> The complainant states that the signs failed to display any type of notice identifying who authorized and paid for the communications. The highway signs promote Dennis Rehberg's candidacy and expressly advocate his election for office by stating, in very large letters, the name "Rehberg" above the word "Congress," which appears to be painted in somewhat smaller but still large letters.

**C. The Response And Other Facts**

Alan Mikkelsen, campaign manager of the Rehberg Committee, filed a response on behalf of the respondents on November 15, 2000 stating that the "[signs] in question may have been placed by the campaign staff and volunteers on or about September 9, 2000 in the Red Lodge Montana area." The response does not dispute that the signs expressly advocated Rehberg's election. It also states that the signs did not originally bear a disclaimer as painted, but asserts that before each sign was installed, a disclaimer was affixed, which bore the words: "Paid for by Rehberg for Congress, Lorna Kuney, Treasurer, P.O. Box 1597, Helena, MT 59624." The respondents assert that the disclaimers were pre-printed on 3"x5" cards and were "attached to the signs with several layers of 2.5" wide clear packing tape" in order to ensure that they would remain weather proof.<sup>4</sup>

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<sup>3</sup> Complainant alleged that the signs were located in the Red Lodge, Montana area but did not give specific locations.

<sup>4</sup> Affidavits by a Rehberg Committee staff member and a volunteer that were attached to the response only assert that the disclaimers were affixed to every sign placed in the Red Lodge area; they do not contain the same detailed description of the procedure used in affixing disclaimers to the signs that is found in the unsworn body of the response.

1           The response further states that upon notification by a local supporter that the disclaimer  
2   on one sign was removed within a week of its installation, the respondents assigned staff to  
3   replace the disclaimer. The response does not state whether this particular sign was one of the  
4   signs pictured in the complaint. The response implies, and one of the affidavits attached to it  
5   asserts, that unauthorized third parties must have removed the disclaimers.

6           On its October 2000 Quarterly Report, the Rehberg Committee reported \$7,127.45 in  
7   disbursements for supplies and travel related to highway signs.

8           D.     Analysis

9           The complaint concerns two signs, and the response describes corrective action with  
10   respect to only one sign. Therefore, at least one of the signs pictured in the complaint must have  
11   stood without a disclaimer for the balance of the campaign after losing the disclaimer that  
12   respondents claim they affixed to it. Moreover, because the response asserts that corrective  
13   action was taken upon a report from a supporter that a sign had lost a disclaimer, but does not  
14   specifically assert that this sign was one of the two signs complained of, it is possible that both  
15   signs pictured in the complaint stood without a disclaimer from before the time they were  
16   photographed through Election Day.<sup>5</sup> Finally, and as noted, there is no dispute that the signs  
17   expressly advocated Rehberg's election.

18           The present case bears some similarities to a previous disclaimer matter. In MUR 4920  
19   (Kind for Congress), the Commission found reason to believe the respondents violated the Act by  
20   displaying a large mural sign on the side of a building without a proper disclaimer. As in this

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<sup>5</sup>     Indeed, given the amount of money the Rehberg Committee apparently spent on expenses related to similar signs, and given that the separately affixed disclaimer cards appear to have been vulnerable to removal by vandals or the elements, it is possible that similar Rehberg signs around Montana stood without disclaimers for at least some portion of the campaign.

1 case, the respondents in MUR 4920 asserted that the action of unauthorized third parties was a  
2 cause (although in that case not the proximate cause) of their failure to display a disclaimer.  
3 There, vandals sprayed graffiti on the sign, and removal of the graffiti also removed the  
4 disclaimer. The Commission indicated that respondents' obligation to replace the removed  
5 disclaimer became effective not later than when they received notice of the problem.<sup>6</sup>

6 The Rehberg Committee's highway signs apparently complied with 2 U.S.C. § 441d(a) to  
7 the extent they bore separately affixed disclaimers. However, some force other than the  
8 committee or its agents may have removed the disclaimers from at least two signs, just as the  
9 vandals defaced the disclaimer in MUR 4920. Therefore, the Rehberg Committee became  
10 obligated, not later than when it received notice of the problem, to replace the removed  
11 disclaimers. However, even though the Rehberg Committee was aware the disclaimers had been  
12 removed, there is no evidence that it took action to ensure that disclaimers were restored to both  
13 signs pictured in the complaint. Even if one of the signs in the complaint was the sign the  
14 respondents asserted that they corrected based on information they received from a supporter,  
15 they would have had notice that the other sign was missing a disclaimer not later than when they  
16 received the complaint. But the respondents do not claim that they corrected the second sign

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<sup>6</sup> In its Statement of Reasons in MUR 4920, the Commission "agreed with the General Counsel that the sign . . . required a disclaimer." The Commission exercised its prosecutorial discretion to take no further action and close the file because, among other reasons, "[u]pon notification . . . the respondent immediately had the disclaimer reapplied." MUR 4920, Statement of Reasons. However, for at least three Commissioners, this fact mitigated the violation but was no defense to liability for it. Commissioner Smith, who signed the Statement of Reasons, also issued a "Statement for the Record" in which he said he "did not believe that strict liability can be imposed on a campaign where a third party defaces or removes a disclaimer." However, he agreed with the Commission's exercise of prosecutorial discretion in order to avoid disproportionate discovery leading to an "arcane judgment as to the promptness with which the campaign would be required to replace the disclaimer." MUR 4920, Statement for the Record of Commissioner Bradley A. Smith.

1 after receiving the complaint or otherwise.<sup>7</sup> Therefore, this Office recommends the Commission  
2 find reason to believe that the Rehberg Committee and Lorna Kuney, as treasurer, violated  
3 2 U.S.C. § 441d(a).

4 However, this Office also recommends that the Commission not pursue the matter  
5 further. While it is reasonable to speculate that several Rehberg highway signs lost their  
6 disclaimers, *supra* n. 5, no more than two or three signs can currently be identified as having  
7 stood without a disclaimer for any period of time. Additionally, because of the less-than-  
8 permanent nature of the signs (much less the 3"x5" cards that were assertedly attached to them),  
9 it is unlikely that further discovery would either effectively verify the scope of the violation or be  
10 an efficient use of the Commission's resources, given the value of the case.<sup>8</sup>

11 Moreover, comparison of this matter with MUR 4920 also leads this Office to  
12 recommend no further action. As noted, although the Commission found reason to believe the  
13 respondents there had violated 2 U.S.C. § 441d(a), it also exercised its prosecutorial discretion to  
14 take no further action and close the file. Although the apparent violations here appear to have  
15 occurred in the last month before an election, they also appear to have been of a much shorter  
16 duration than the violation in MUR 4920, which spread over parts of three election cycles.  
17 Moreover, it is unknown whether the signs here were placed in heavily traveled locations; the  
18 mural in MUR 4920 was on the side of a building in a heavily traveled downtown location.  
19 Therefore, this Office recommends that in the proper ordering of its priorities and limited  
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<sup>7</sup> The respondents also do not claim that they took the sign down before receiving the complaint, either because the election was over or for any other reason.

<sup>8</sup> Even if every Rehberg highway sign lost its disclaimer, the amount in violation probably would not exceed roughly \$7,000.

resources, the Commission find reason to believe that Rehberg for Congress Committee and Lorna Kuncy, as treasurer, violated 2 U.S.C. § 441d(a), and admonish the respondents, but take no further action and close the file. *See Heckler v. Chaney*, 470 U.S. 21 (1985).

**III. RECOMMENDATIONS**

1. Find reason to believe that Rehberg for Congress Committee and Lorna Kuncy, as treasurer, violated 2 U.S.C. § 441d(a), but take no further action and send an admonishment letter.
2. Close the file.

Lawrence H. Norton  
General Counsel

1/8/02  
Date

BY:

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